
U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002



Issue date: 30Oct2002

Case No.: 2002-ERA-00017

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In the Matter of:

JOSEPH F. DE MELO,
Complainant,

v.

U.S. DEPARTMENT OF VETERANS AFFAIRS,
Respondent.

.....

Appearances:

Joseph F. De Melo
Pro se

Kathleen Tulloch, Esq.
On Behalf of the Respondent

Before: THOMAS M. BURKE
Associate Chief Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case arises out of a complaint of discrimination filed pursuant to Section 211 of the Energy Reorganization Act of 1974 ("ERA"), as amended, 42 U.S.C. Section 5851, *et seq.* The implementing regulations are found at 29 C.F.R. Part 24. The ERA affords protection from employment discrimination to employees of Nuclear Regulatory Commission ("NRC") licensees who engage in activity that effectuates the purposes of the ERA or the Atomic Energy Act of 1954, as amended, 42 U.S.C. Section 2011, *et seq.* Specifically, the law protects so-called "whistleblower" employees from retaliatory or discriminatory actions by the employer. 42 U.S.C. § 5851(a)(1). To succeed, the

complainant must demonstrate that his protected behavior or conduct was a contributing factor in the unfavorable personnel action. 29 C.F.R. 24.7(b).

I. Procedural History

Complainant, Joseph F. De Melo, was employed by respondent, the United States Department of Veterans Affairs as a Health Physicist until his resignation on November 27, 2001. De Melo filed a complaint with the Department of Labor alleging that he was harassed and discriminated against for raising safety concerns at the work site resulting from his supervisor's failure to implement some requirements of the NRC guidelines/regulations. His complaint was denied on March 25, 2002 by the Office of Safety and Health Administration, and De Melo appealed for a formal hearing on April 2, 2002. The complainant's allegation of discrimination under Section 211 of the ERA was then referred to the Office of Administrative Law Judges for a hearing. A formal hearing was held on the record from June 26, 2002, until June 28, 2002.¹

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II. Issues

1. Whether complainant engaged in protected activity by reporting various radiation safety infractions to his direct supervisor and/or to the Radiation Safety Committee.
2. Whether respondent retaliated against complainant by constructively discharging him through the issuance of a reprimand and/or assigning complainant with excessive work.
3. Whether respondent discriminated against complainant by withholding the title of Radiation Safety Officer ("RSO"), giving low performance evaluations, and/or assigning him with excessive work-related responsibilities.
4. Whether respondent discriminated against complainant through general harassment, including but not limited to the incident on November 16, 2001, phone monitoring, following him, disruption of lunch break, and "sardonic smiling."

III. Findings of Fact

Respondent is the U.S. Department of Veterans Affairs, which operates the New York Harbor Health Care System (formerly known as the VA New York Medical Center). This facility is under a license by the NRC allowing it to use radiation in the course of its research and treatment of patients.

Complainant began working at the VA New York Harbor Health Care System in August, 1993, as a Health Physicist. Complainant held the position of Health Physicist for his entire tenure at respondent's facility, from August, 1993 through November 27, 2001, when the complainant retired. When complainant began working at respondent's facility he was put under the supervision of two individuals, the chief of staff and Dr. Howard Banner. Dr. Banner's job titles include Chief of Nuclear Medicine Services, Radiation Safety Officer, and Chairmen of the Radiation Safety Committee.

A significant responsibility of complainant's job was to ensure that the hospital complied with all the regulations of the NRC and the hospital regulations concerning radiation safety. Among other responsibilities, complainant gave radiation safety training to fellow employees and reported safety violations occurring at the facility to his supervisor, Dr. Banner, who was the Radiation Safety Officer. Dr. Banner also chaired the Radiation Safety Committee. In 1995, complainant was made Secretary of the Radiation Safety Committee with the responsibility for typing and distributing the minutes of these meetings. This responsibility was delegated to him while he was on sick leave, undergoing an operation on his leg due to injuries complainant sustained after he was assaulted during an unrelated incident. The position of Secretary was in addition to his position as Health Physicist, and did not result in an increase in grade or pay.

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When complainant initially started working for respondent, he shared his work responsibilities with another Health Physicist named Carole Caffarella. Caffarella retired in 1996, and complainant assumed her work load. No replacement for Caffarella's position was ever made. Complainant complained to various co-workers at respondent's facility that his workload significantly increased after the departure of Caffarella. Specifically, complainant complained that he was overworked by his supervisor Dr. Banner, and that Dr. Banner put unreasonably short deadlines on complainant's assignments. At the hearing, not one of the witnesses proffered by the complainant testified that they had first hand knowledge of complainant's workload. Hence, no one could verify the merits of complainant's complaints regarding his excessive workload -- they could only verify that the complaints had been made. (Drosopoulos, Tr. 13; Islam, Tr. 20; Staudinger, Tr. 24; Coon, Tr. 30; Arena, Tr. 33; Monaco, Tr. 39; Fraser, Tr. 43; Chin, Tr. 52; Wu, Tr. 293-94).

Complainant continued to work at respondent's facility despite the fact that he felt he was being treated unfairly. In the course of making sure the facility was not violating radiation safety guidelines, complainant told Dr. Banner of incidents where employees were impermissibly keeping open the door of the hot lab and eating in the research lab. No date was provided as to when these reports were made. Complainant felt that Dr. Banner did not adequately respond to these complaints. Furthermore, complainant felt that his notification of such violations irritated Dr. Banner, causing Dr. Banner to retaliate against complainant.

On October 22, 2001, Dr. Banner made a work-related request to complainant over the phone, asking complainant to provide him with information regarding the quantities of Chlorine-36 in the scintillation vials. Dr. Banner explained to complainant that this information was needed as part of an effort to obtain a radioactive waste broker. Dr. Banner asked the complainant to provide this information because he felt that complainant was most familiar with this information. Tr. 187. In response to this request, complainant became upset and shouted at Dr. Banner over the phone. Complainant felt this request by Dr. Banner was unreasonable because it disrupted and interfered with his other job responsibilities. Complainant told Dr. Banner that he would not provide this requested information because he had other work to do, and that it was the job of the Radiation Safety Officer to obtain this information.

On November 5, 2001, Dr. Banner met with the Labor Employee Relations Specialist, Andrea Hodge, regarding what Dr. Banner perceived as insubordination on the part of the complainant. Hodge advised Dr. Banner to meet with complainant and give him a direct order because it was only permissible to charge a subordinate with insubordination if they are given a direct order and refuse to carry it out. At that time, Dr. Banner indicated to Hodge that a direct refusal had not been the case. Tr. 149. Dr. Banner then met with complainant on November 5, 2001, in the presence of Cecil Stapleton, the respondent's radiology administrator, and made a formal request regarding information he had previously requested by e-mail (Cx. 10), regarding the location, quantity, and users of radioactive materials in the respondent's facility. As before, complainant replied that he would not provide the information because he was busy with other work-related responsibilities, including preparing for the upcoming Radiation Safety Committee meeting. Dr. Banner quoted the complainant as stating, "I will not comply and that if you want to do something go ahead, I'll file a grievance." Rx. 70.

Subsequently, Dr. Banner wrote a "proposed reprimand" to the complainant on November 6, 2001, and delivered it to complainant on November 9, 2001. Rx. 70. The proposed reprimand was delivered by Dr. Banner and in the presence of Stapleton. However, complainant refused to accept delivery of the proposed reprimand, and Dr. Banner noted this occurrence on the bottom of the letter, signed and dated it, and had Cecil Stapleton also sign as a witness. Rx. 70. The proposed reprimand described the October 22 and the November 5 incidents between himself and the complainant. The complainant was charged with insubordination and disrespectful behavior in connection with the October 22, 2001 incident, and a second count of insubordination in connection with the November 5, 2001 incident. The reprimand also set forth that the complainant had the right to reply to the reprimand by November 23, 2001, so that Dr. Banner may take complainant's reply into consideration before he made a final reprimand determination. Additionally, during November, in an undated memo, Dr. Banner gave complainant a voluntary referral to the Employee Assistance Program ("EAP"), in response to a "pattern of impaired job performance and/or conduct." Rx. 26.

On November 20, 2001, Dr. Banner notified Hodge that he had received a response from the complainant regarding his proposed reprimand (Complainant's response at Cx. 11), and that it was not factual nor did it demonstrate a satisfactory reason why the reprimand should not be effected. Rx. 50. Dr. Banner reported to Hodge that he had decided that complainant should be reprimanded. On November 26, 2001, Dr. Banner notified complainant that he had been reprimanded for the incidents as they were described in the proposed reprimand, and that a copy of the reprimand would remain in his Official Personnel Folder for 3 years, unless his future attitude and behavior warranted its removal after 6 months. Rx. 51.

In response to the confrontations complainant had with Dr. Banner, the complainant met with Hodge in early November, to find out what he could do about these problems. Tr. 153. Hodge told complainant that he could file a grievance or go to EEO. In a letter dated November 7, 2001, complainant issued a formal grievance to Dr. Banner. Cx. 10, Rx. 28. The grievance is void of any reference to protected activity or whistleblowing retaliation. The problems set forth by the complainant in his grievance are objections to work-related requests and the time frames given by Dr. Banner for those assignments, objections to Dr. Banner's disruption of complainant's lunch hour with work-related requests, and objections to behavior by Dr. Banner that the complainant perceived inappropriate, such as going through complainant's personal property, spying on him, and watching his footsteps. Complainant sought to have Dr. Banner cease this alleged behavior, and he also made a number of other requests to Dr. Banner.² Dr. Banner responded to each allegation and request for relief stated in complainant's formal grievance via a memorandum dated November 14, 2001. Rx. 48. Complainant then replied to Dr. Banner's response in a memorandum to Dr. Banner dated November 16, 2001. Rx. 49. No further action appears in the record regarding this specific grievance by the complainant.

On November 5, 2001, the same day as the second confrontation detailed by Dr. Banner in the proposed reprimand, complainant visited the Human Resource Services to request an estimate of his retirement benefits. Rx. 2. At that time, the complainant's retirement date was scheduled for approximately January 1, 2002. On November 8, 2001, complainant met with Hodges about retiring and inquired how quickly it could be done. Complainant indicated to Hodges that he wanted to retire on November 27, 2001, and she had an estimate completed immediately for the complainant. Rx. 67. On November 14, 2001, complainant signed an official application for immediate retirement, indicating he would retire on November 27, 2001. Rx. 68. Sometime after the November 8, 2001 meeting between Hodge and complainant, Hodge told Dr. Banner that complainant had expressed an interest in retiring. Tr. 148. On November 15, 2001, Hodges e-mailed Dr. Banner notifying him that complainant had filed the official papers, and that he would be retiring on November 27, 2001. Rx. 71.

On November 16, 2001, Dr. Banner observed complainant in the respondent's parking lot wheeling out what appeared to be work-related documents from the building to his personal car. Dr. Banner approached complainant and inquired what he was doing. Complainant replied that he was taking home his personal files. Dr. Banner did not

believe the files to be personal, he felt that they were radiation safety files. Dr. Banner followed complainant to his car where he observed approximately eight cartons of files in there that appeared to be work-related, despite the fact that complainant maintained that they were his personal files. The complainant refused to answer any further questions by Dr. Banner regarding the content of the files, and returned to the building. Dr. Banner called Stapleton to come down and observe the files through the windows of complainant's car.

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Believing that the complainant planned to leave the respondent's premises with government property, Dr. Banner and Stapleton reported the circumstance to the VA police. Dr. Banner showed the car to the police and waited for the complainant to return for a half hour. Because complainant did not return in that time, Dr. Banner returned to the hospital to resume his work and left the VA police to handle the situation. Sergeant Vega, of the VA police, contacted complainant on the telephone and asked him to come down to the parking lot. Sometime later, the complainant appeared, and Sergeant Vega requested consent to view the material in complainant's car. Complainant consented and maintained that the materials were his personal files. Tr. 314-15. Because Sergeant Vega was unfamiliar with the contents of the files, he called Dr. Banner to come down and survey the material. After looking through the files in the car, Dr. Banner told Sergeant Vega that the files were government property. The VA police decided to remove the files from complainant's car. The police then took possession of complainant's government issued keys and escorted him to the police operations office. Complainant refused to produce identification upon request of Sergeant Vega. Complainant became agitated and aggressive, so Sergeant Vega placed restraints on the complainant. Sergeant Vega then conducted a search of complainant and removed his wallet from his person, from which identification was obtained.

Complainant was then issued two violations by the VA police. One citation was for attempting to remove government property, and the other citation was for failing to comply with the instruction of a police officer to produce identification.³ The police then escorted the complainant to his office so he could take some personal items home with him. At that time, the police confiscated all of complainant's government issued keys, and two box cutter knives found in his office. The police also informed complainant that he would require a police escort to gain access to his office.

A subsequent review of the files obtained from complainant's car revealed that most of the materials were just duplicate copies of Radiation Safety Committee minutes, management briefing reports, and other technical files that the complainant wanted for future reference at his next place of employment. However, at least one file in the box was an original containing sensitive patient information that would be required by the NRC during an inspection. Tr. 220. Some of the files contained personal information about other employees at the facility, including their social security numbers. Tr. 221.

Complainant returned to work a few days after the incident on November 16, 2001. His last day of work with the respondent was November 27, 2001, the date of his retirement.

Complainant filed a Complaint for whistleblower retaliation on February 15, 2002. Rx. 7. The complaint states, "My main reason for deciding to retire was that Dr. Banner was driving me nuts," and "I was forced to retire due to discrimination by Dr. Banner." Each allegedly discriminating event will be discussed individually.

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Dr. Banner's Refusal to Relinquish RSO Title To Complainant

At complainant's prior job with the Army he held the position of Radiation Safety Officer. When complainant accepted the job with the respondent, he was under the impression that he would become the facility's Radiation Safety Officer. Although the grade and pay complainant received when he began working at the respondent's facility were what he expected, he was not given the title of RSO.⁴ Instead complainant's position was titled Health Physicist. Dr. Banner retained the title of RSO, in addition to his other titles of Chief of Nuclear Medicine and the Chairman of the Radiation Safety Committee. Complainant felt that Dr. Banner held on to the title of RSO so that Dr. Banner could portray to the management that he was doing more work than he was really doing. Tr. 66. Complainant felt that he was doing all the work of the RSO and Dr. Banner was taking credit for it. Tr. 66.

Complainant wanted to attain the title of Radiation Safety Officer because he felt that was what was promised by respondent when he accepted the position. Tr. 120. Complainant felt that he was qualified for the position. Tr. 104. In September 1993, the respondent pursued a request to change the RSO from Dr. Banner to complainant. Rx. 12. Despite the fact that prior to the complainant being hired, someone at the NRC told Dr. Banner that complainant would meet the qualifications of an RSO, the NRC later found that complainant did not meet the requirements for being the RSO at respondent's medical facility because he lacked experience in medical facilities. Tr. 160. The decision of the NRC is reflected in the Radiation Safety Committee minutes dated December 2, 1993. Rx. 38.

Although the NRC denied the proposed amendment, it stated that it would reconsider amending the licence to allow complainant to be the RSO after one year had passed. However, Dr. Banner did not propose an amendment at that time. Tr. 161. Dr. Banner felt that complainant was unable to work in a supervisory capacity independently and that he needed to be closely supervised at all times. Tr. 161. Dr. Banner observed complainant to have a difficult personality and testified regarding conflicts the complainant had with a number of co-workers. Tr. 161-65.

Dr. Banner's decision to withhold this position was based on his credible determination that complainant did not exhibit the personality qualities necessary for holding a supervisory position in the respondent's facility. Additionally, the proffered reason given

by Dr. Banner for not resubmitting an amendment to make complainant the RSO is not considered to be pretextual. The sincerity of Dr. Banner's reasons are corroborated by the fact that complainant testified that his work-related problems did not start until after Caffarella retired in 1996. Tr. 63-64. Therefore, Dr. Banner's decision to not make complainant the RSO cannot be based on whistleblower retaliation because Dr. Banner made the decision not to resubmit an amendment naming complainant as RSO prior to 1996, a time when complainant testified that he did not have any problems with his work.

Moreover, complainant never alleged that Dr. Banner withheld the RSO position from complainant based on whistleblower retaliation.⁵ Tr. 69. Complainant testified that Dr. Banner held onto the RSO position for the "glory" of the title. Tr. 119. If complainant's allegation is correct, and Dr. Banner is truly motivated by a desire to take credit for other people's work, that is irrelevant to this proceeding because the sole purpose of this proceeding is to determine if an unfavorable personnel action occurred because of protected "whistleblower" activity.

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Low Evaluations

Complainant alleged that Dr. Banner gave low evaluations because complainant pointed out radiation safety violations.⁶ Rx. 8. Andrea Hodge, the Labor Employee Relations Specialist, testified that respondent's entire system of employee evaluation changed in 1997 and eliminated monetary awards for all employees. Tr. 151. Although complainant alleged that he received minimal monetary compensation based on his evaluations completed by Dr. Banner prior to 1997, when monetary awards were still available for individual employees, this assertion is not supported by any evidence in the record. Cx. 14.

Complainant submitted into the record a notification of personnel action which indicated that his monetary award in 1995 based on his performance evaluation was \$301. Cx. 15. The complainant has not provided any evidence that his monetary award was "minimal" as compared to other workers.⁷ Conversely, the evaluations of the complainant completed by his supervisor Dr. Banner do not reveal low marks. Rx. 8. In fact, the evaluations of complainant completed by Dr. Banner consistently rated complainant as at least, "fully successful" or "successful" at the specifically listed achievements. Rx. 8. Furthermore, Hodge testified that Dr. Banner never gave complainant a negative performance evaluation, and she would have seen it if Dr. Banner had given complainant a negative evaluation. Tr. 150.

Dr. Banner Saddled Complainant with an Unreasonable Workload

Complainant testified that he was overwhelmed with work and did not have enough time to complete his job responsibilities within the deadlines given by Dr. Banner. Tr. 84. Dr. Banner concedes that complainant's workload increased after Caffarella, the other Health Physicist, retired in 1996. Tr. 171. However, Dr. Banner testified that Caffarella's

retirement was anticipated, and complainant was hired before she left so that the transition would be smooth. Tr. 171. Therefore, the additional work complainant was responsible for was a direct result of Caffarella's departure, and not from whistleblowing retaliation. Additionally, John Donnellan, Jr., the Director of the facility where complainant was employed, responded to complainant's workload complaints in a letter dated July 18, 2001, which stated that he had evaluated the complainant's workload and recognized that it was difficult, but he did not find it unmanageable due to complainant's training and level of experience. Rx. 44.

Failure to Address Radiation Safety Violations

Complainant alleged that Dr. Banner repeatedly failed to address radiation safety violations. Rx. 7. Conversely, Dr. Banner maintains that he always addressed the violations pointed out by complainant. Tr. 174; Tr. 184. Complainant provided no evidence other than general allegations, that this occurred at the respondent's facility. Furthermore, complainant conceded on cross-examination that Dr. Banner always gave verbal warnings to his employees found violating radiation safety guidelines, however complainant felt that verbal warnings were not enough. Tr. 112.

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With regard to allegations of ignored safety violations, Dr. Banner testified about an incident where a worker was found eating in the lab twice; the first incident resulted in a verbal warning and the second incident resulted in a 30 day suspension, and was documented in the Radiation Safety Committee Minutes of December 1994. Tr. 175. Dr. Banner also testified that he addressed violations directly to his staff at the Nuclear Medicine Services meetings, and took action. Tr. 175; Tr. 177-78; Rx. 84. In response to complainant's allegation that Dr. Banner ignored a report that the hot lab door was open, Dr. Banner testified that he verbally admonished the responsible employee and asked complainant to give that employee whatever he thought was appropriate additional training to ensure that there would not be repeat offenses. Tr. 176-77; Rx. 75. Complainant completed this training with the employee, and sent a confirmation to Dr. Banner. Cx. 8. Dr. Banner also responded to an allegation by the complainant that Dr. Banner did not address an incident where an employee impermissibly entered a hot lab without a badge. Tr. 178-79. Dr. Banner testified that he met with the employee and verbally admonished her, discussed the incident at the Nuclear Medicine Service staff meeting, and asked complainant to give her follow up training. Tr. 179-80; Rx. 80. Dr. Banner also wrote a memo to the complainant advising him of the action taken in response to the violation he pointed out. Rx. 74. Additionally, in response to a safety concern pointed out by complainant, that an employee had a high dosimetry reading, Dr. Banner testified that he discussed it at the staff meeting and decided to implement a rotation system for technologists in different departments so their radiation exposure would be evenly distributed. Tr. 181-82; Tr. 183; Rx. 78; Rx. 83. Dr. Banner also purchased additional safety equipment in response to this safety concern. Tr. 182-83; Rx. 79.

Complainant also alleged that one of his coworkers, Edna Francis, impermissibly smoked cigarettes in the women's locker room, and the smoke came into his office through the vent. Tr. 123-24. Although Francis was never caught red-handed and complainant's request to move his office was granted, complainant still felt Dr. Banner did not do enough to correct this situation. Whether smoking in the women's locker room is a violation of radiation safety regulations or just hospital smoking ordinance is not clear. In either event, Dr. Banner testified that he lectured Francis about smoking in the hospital on many occasions. Tr. 163. Dr. Banner also told complainant that if he caught Francis red-handed he should contact Dr. Banner or the VA police so they could issue her a summons. Tr. 163. Dr. Banner appropriately responded to the smoking allegations by complainant.

The evidence does not support a finding that Dr. Banner ignored safety violations pointed out by complainant. Rather, complainant disagreed with Dr. Banner's method of dealing with offenses through verbal admonishment. Furthermore, the fact that the NRC found no violations of radiation safety regulations/guidelines during its inspections while the complainant was employed by respondent as a Health Physicist evidences a finding that radiation safety violations were not being ignored by Dr. Banner.

Lunch Disruption, Phone Tapping, Following, and Other Harassing Behavior

Complainant alleged that Dr. Banner harassed him by purposely disturbing him with work-related questions during his lunch hour. Tr. 72. Dr. Arena testified that he observed one incident where Dr. Banner disturbed complainant during his lunch hour and, he testified that he saw Dr. Banner "sometimes" enter complainant's office almost at closing time, "but not as a rule." Tr. 32. Complainant contends that Dr. Arena is "too busy" to remember the other incidents. Tr. 73. However, there is no evidence that Dr. Banner purposely targeted the complainant's lunch hour to ask him work-related questions, rather, the record indicates that Dr. Banner is extremely busy as well and any work-related questions that came during complainant's lunch or towards the end of his work day were not inappropriate. The one corroborated incident in the record where Dr. Banner disrupted the complainant's lunch is insignificant when considering that the complainant worked under Dr. Banner for at least 8 years. Furthermore, the complainant is still "on the clock," so to speak, toward the end of his work day, and it is unrealistic for complainant to expect his supervisor to not contact him with work-related questions at any point during his shift, even near the end. There is no evidence that Dr. Banner targeted any specific time of the day to ask complainant work-related questions, nor does the record reflect a pattern of discriminatory behavior of lunch time disruption.

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Complainant also made allegations of unusual and harassing behavior occurring towards him at respondent's facility, such as phone tapping by Dr. Banner. Tr. 46. Complainant provided no evidence to corroborate these allegations. His complaint of phone tapping was forwarded by Francine Fraser, the director of Equal Employment

Opportunity and the Minority Veterans Program for Network III, to the appropriate hospital officials, but Ms. Fraser never received any confirmation back that complainant's phone was, in fact, being tapped. Tr. 47. Dr. Banner testified that he did not tap the complainant's phone, and an employee from communications called Dr. Banner in response to complaints made by the complainant and told him that the hospital was not tapping anyone's phone. Tr. 168; Rx. 42. Further vague allegations by complainant that Dr. Banner was "following his footsteps" are not supported by the evidence, and they are not logical considering how unlikely it is that someone with the job responsibilities of Dr. Banner could find the time to surreptitiously follow around the complainant.

Other uncorroborated allegations by complainant indicate that his perception of reality regarding Dr. Banner and/or the respondent in general is exaggerated. Complainant listed in his formal grievance to Dr. Banner that Dr. Banner purposely gives him "sardonic smiles." At the hearing complainant expounded on this allegation stating that these smiles were offensive and occurred over the entire time he was there from 1993 to 2001. Tr. 117. Additionally, complainant left in his office a document called "Cars Following Me." Rx. 54. When asked about the document on cross-examination, complainant stated that he had documented 11 cars following him and he was not sure whether it had something to do with work. Tr. 127-28.

Referral to Employee Assistance Program (EAP) and the Decision to Retire

In the Complaint, complainant states, "Dr. Banner gave me an undated Memo in the first two weeks of November 2001 referring me to EAP. I went to see the EAP representative (George Buckner) the next day and he suggested that I retire because I was not getting anywhere with my problems with Dr. Banner." Rx. 7. Dr. Banner testified that he gave the complainant the referral to EAP on November 7, 2001 because he felt complainant's ability to work was impaired and he needed professional help. Tr. 194. Dr. Banner testified that complainant's reaction to his attempt to procure work-related information from complainant resulted in his determination that complainant should be referred to EAP. Tr. 193-94. Dr. Banner testified that he attempted to reach complainant on complainant's office phone to request the needed work-related information. However, complainant refused to answer his phone so Dr. Banner asked Stapleton to call him, which also resulted in unanswered calls. The area receptionist confirmed for Dr. Banner that complainant was in his office. Subsequently Dr. Banner, accompanied by Stapleton, went to complainant's office in order to personally talk to him about the assignment and question why he was ignoring the phone. Dr. Banner testified that complainant responded that he would not speak directly to him about work assignments anymore, even though Dr. Banner was his supervisor. Subsequently on November 7, 2001, Dr. Banner gave complainant a referral to EAP, and in return, complainant handed Dr. Banner his grievance. Tr. 194.

The referral to EAP was voluntary but recommended. Cx. 13, Rx. 26. The complainant indicated in his Complaint that he went to EAP the next day (November 8, 2001) to see George Buckner. Complainant asserts in his Complaint that Buckner suggested he retire. Rx. 7. However, there is no evidence in the record indicating what was discussed at the meeting between complainant and Buckner; complainant only reveals that general statement allegedly made by Buckner.

The evidence in the record shows that on the same day that complainant went to EAP, November 8, 2001, he also met with Hodge to get an estimate for immediate retirement. Also in November, but prior to his November 8, 2001 meetings with Hodge and Buckner, complainant had been to the Human Resource Department to get an estimate of his retirement benefits. Complainant contends at that point he had not yet definitively made up his mind to retire.

The preponderance of the record evidence shows, *inter alia*, that complainant retired because he perceived that Dr. Banner was treating him unfairly, but not because he was in any way persuaded or coerced by Buckner, as implied in the Complaint. Complainant testified at the hearing that he retired because he was overworked. Tr. 66. The Complainant also stated that he retired because Dr. Banner was driving him nuts, and that discrimination by Dr. Banner forced him to retire. Rx. 7. Furthermore, even if Buckner suggested that complainant retire, it does not assist the complainant's burden because Buckner's comments are related to mutual conflict between complainant and Dr. Banner over answering the telephone and taking assignments, instead of being responsive to whistleblowing retaliation.

IV. Conclusions of Law

A. Applicable Law

It must be determined whether the complainant has proven, by a preponderance of the evidence, that he engaged in protected activity under the ERA, that his supervisor, also an employee of the respondent, took adverse action against him, and that complainant's protected activity was a contributing factor in the adverse action that was taken. *Kelly v. Lambda Research, Inc.*, 2000-ERA-00035, at *16 (ALJ April 26, 2002), *citing Dysert v. Secretary of Labor*, 105 F.3d 607 (11th Cir. 1997); *Simon v. Simmons Foods*, 49 F.3d 386 (8th Cir. 1995); *Ross v. Florida Power and Light*, Case No. 1996-ERA-00036, ARB Case No. 98-044, Fin. Dec. & Ord., Mar. 31, 1999, slip op. at 6; *see also* 42 U.S.C. § 5851(b)(3)(C). In order for complainant to prevail based on circumstantial evidence of retaliatory intent, he must

establish by a preponderance of the evidence that the employer was subject to the Act, that he was engaged in activity protected under the Act, that he was subjected to adverse employment action, that Respondent was aware of the protected activity when it took the adverse employment action, and that the protected activity was the reason for the adverse action.

Kelly, 2000-ERA-00035 at *17, citing *Trimmer v. United States Dep't of Labor*, 174 F.3d 1098, 1101-02 (10th Cir. 1999); *Seater v. Southern California Edison*, 95-ERA-13 at 14 (ARB Sept. 27, 1996).

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I. Department of Veterans Affairs as "Employer" Under the ERA

A mandatory element of a valid claim brought under the ERA's employee protection provisions is that the employer is subject to the Act. *Kahn v. U.S. Secretary of Labor*, 64, F.3d 271, 277 (7th Cir. 1995), quoting *Bechtel Construction Co. v. Secretary of Labor*, 50 F.3d 926, 933-34 (11th Cir. 1995) (citing 42 U.S.C. § 5851). Under the ERA, the term "employer" includes:

- (A) a licensee of the Commission or of an agreement State under section 274 of the Atomic Energy Act of 1954 (42 U.S.C. 2021);
- (B) an applicant for a license from the Commission or such an agreement State;
- (C) a contractor or subcontractor of such a licensee or applicant; and
- (D) a contractor or subcontractor of the Department of Energy that is indemnified by the Department under section 170 d. of the Atomic Energy Act of 1954 (42 U.S.C. 2210(d)), but such term shall not include any contractor or subcontractor covered by Executive Order No. 12344.

42 U.S.C. § 5851 (a) (2). In this case, the evidence indicates that the respondent is a licensee of the Nuclear Regulatory Commission. Because the respondent specifically falls under 42 U.S.C. § 5851 (a)(2)(A), it is thereby subject to the ERA.

2. Protected Activity

In a claim of retaliation or discrimination arising under the ERA, the complainant must demonstrate that they participated in protected activity which furthers the purpose of the ERA. See 42 U.S.C. § 5851 (1)-(3); 29 C.F.R. § 24.2. An informal complaint to a supervisor may constitute protected activity. See, e.g., *Nichols v. Bechtel Construction, Inc.*, 1987-ERA-00044 (Sec'y Oct. 26, 1992) (employee's verbal questioning of foreman about safety procedures constituted protected activity), appeal dismissed, No. 92-5176 (11th Cir. 1992); *Dysert v. Westinghouse Electric Corp.*, 1986-ERA-00039 (Sec'y Oct. 30, 1991) (employee's complaints to team leader protected).

A significant portion of complainant's job as Health Physicist was to make sure that the respondent's facility was free of radiation safety violations and report any violations found to his supervisor, Dr. Banner. Complainant testified to two instances where he

reported radiation safety violations to his supervisor, Dr. Banner. The first instance was a report that the door to the hot lab was being kept open, in violation of 10 C.F.R. part 2. Tr. 69-70. The second radiation safety violation report in the record was one of people eating in the research lab, in violation of 10 C.F.R. part 20. Tr. 70. These reports to Dr. Banner constitute protected activity under the ERA.

Additionally, the record contains a list of thirty-one radiation safety violations compiled by the complainant that were allegedly occurring at respondent's facility. Rx. 9. In order to classify the violations as "protected activity," the complainant must have taken some step to report the violations, while he was employed by the respondent. *See Boyd v. ITI Movats*, 1992-ERA-00043 (Sec'y June 7, 1994) (protected activity did not exist because there was no evidence indicating that respondent was aware of complainant's concerns at the time the lay off decision was made). Simple allegations, post-employment, to the Department of Labor that violations existed at respondent's facility do not constitute protected activity. *See id.* Although the list is titled in the Respondent's index of exhibits as "List of safety concerns allegedly raised by DeMelo to NRC" (Rx. 1), the list is not dated, nor was there any testimony at the hearing about it. The list appears to have been created in preparation for this litigation

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because number fifteen indicates that the list was made after complainant retired.⁸ Many of the individually numbered violations do not state whether the violation was brought to the attention of anyone during complainant's employment, specifically Dr. Banner, the alleged retaliator. The "Statement" on page three to Respondent's Exhibit 9 does not clear up this discrepancy. The "Statement" details complainant's futile attempts to get in touch with Dr. Banner's supervisor until an April 19, 2001 meeting. However the "statement" does not state the complainant's purpose for getting in touch with the supervisor; a number of purposes for this meeting could be inferred, e.g., a discussion of general grievances such as an overburden of work and short deadlines. Hence, it cannot be assumed that all of these alleged radiation safety violations were reported to a supervisor of Dr. Banner's, because those facts are not in evidence. Instead, only the individual allegations on the list that mention that Dr. Banner was made aware of the violation's existence, will be considered protected activity (Specifically numbers: 8, 13, 21, and 27).⁹ The rest of the numbered allegations do not equate to protected activity, because complainant failed to present evidence that Dr. Banner knew of those violations or that they had been brought to his attention. But the four violations that were brought to the attention of Dr. Banner do constitute protected activity.

3. Adverse Employment Action

To show an adverse employment action, complainant must demonstrate, by a preponderance of the evidence, that his employer discharged him or otherwise discriminated against him with respect to his compensation, terms, conditions, or privileges of employment. See 42 U.S.C. § 5851(a)(1). In the case at bar, the adverse

action that the complainant alleges he suffered as a result of his protected activity was a constructive discharge. Complainant asserts that individual incidents of alleged discrimination and/or harassment contributed to his alleged discharge, but they are also separate incidents that could be construed as retaliation. After an analysis of complainant's allegation of constructive discharge, the other allegedly discriminatory actions will be evaluated.

a. Constructive Discharge

Complainant made the decision on November 14, 2001 to resign on November 27, 2001. But complainant alleges that his supervisor, Dr. Banner, engaged in behavior so egregious, it rendered his retirement involuntary. Constructive discharge is established by the complainant when he shows that his working conditions were so "difficult, unpleasant, unattractive or unsafe that a reasonable person would have felt compelled to resign." *Kelly*, 2000-ERA-00035, at *23, quoting *Mosley v. Carolina Power & Light Co.*, 94-ERA-23 (ARB Aug. 23, 1996) (citing *Henn v. National Geographic Society*, 819 F.2d 824, 829-30 (7th Cir. 1987)). However, "[i]t is insufficient that the employee simply feels that the quality of his work has been unfairly criticized." *Id.* Circumstances where an employer was found to have rendered a resignation involuntary include "locking" an employee into a position which no relief is attainable. *Kelly*, 2000-ERA-00035, at *24, citing *Clark v. Marsh*, 665 F.2d 1168, 1174 (D.C. Cir. 1981).

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The record does not support the complainant's allegation that he was constructively discharged. Prior to his decision to resign, complainant alleges that Dr. Banner saddled him with excessive work, and issued him a reprimand on November 9, 2001, for refusal to complete assigned work.¹⁰ There is no question that complainant's work load increased after the resignation of Caffarella in 1996. However there is no evidence that complainant's workload was beyond the scope of what one person of his experience and training could reasonably handle. Complainant performed his work single-handedly from 1996 through November 2001, and received successful performance evaluations.

The proposed reprimand issued by Dr. Banner for insubordination was not factually disputed by the complainant. The complainant did refuse to give Dr. Banner the requested information because complainant was of the opinion that he had other work he needed to do. The reprimand stated that the complainant could appeal Dr. Banner's determination through the grievance procedure, however complainant chose to retire instead of pursuing an appeal. Hence, complainant was not "locked" into a position with no redress of this reprimand. There is no question that complainant disliked his working environment and his amount of responsibilities. The crux of complainant's constructive discharge argument appears to be complainant's personal dislike towards his supervisor and his feeling that Dr. Banner was taking credit for his work by retaining the title of RSO. However none of the specific examples offered by complainant show that his

working environment had attained a status that was so unsafe, difficult, or unpleasant, that the reasonable person would be driven to resignation.

b. Retaliation and/or Discrimination

Complainant was issued a proposed reprimand on November 9, 2001, and issued citations on November 16, 2001, in connection with an incident involving the taking of government property. Complainant alleges that these actions are retaliatory in nature. However, the record shows both of these actions taken towards complainant were justified.¹¹ The facts stated in the proposed reprimand do not appear incorrect or misleading. The proposed reprimand was an adverse personnel action, but the record does not support a characterization of this action as discriminatory because it was an appropriate reaction by a supervisor to a perceived incident of insubordination. Furthermore, the citations issued on November 16, 2001, were issued by the VA police, by their own determination. Dr. Banner did not request that these citations be issued to the complainant. Dr. Banner's concern that government files were leaving the premises was valid, and it was his decision to alert the VA police was appropriate. The evidence in the record reveals that the incident on November 16, 2001, only escalated, thereby necessitating police involvement, because complainant initially refused to cooperate with the questioning by Dr. Banner. All the subsequent actions, which complainant alleges were embarrassing and/or harassing, were taken by the police, and not by Dr. Banner. Hence this incident cannot be characterized as retaliatory.

B. Nexus Between Protected Activity and Adverse Employment Action

The complainant must demonstrate at the hearing, by a preponderance of the evidence, that protected behavior or conduct was a contributing factor in the unfavorable personnel action alleged in the complaint. *See* 29 C.F.R. 24.7(b). Relief may not be ordered if the respondent demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in absence of such behavior. *Id.* Complainant alleges that Dr. Banner was irritated by reports of radiation safety violations and subsequently retaliated and discriminated against him. Tr. 100. To the contrary, Dr. Banner testified that he had no animus toward the complainant for bringing radiation safety violations to his attention, and that it was expected that complainant should point out violations to him, because that was part of his job. Tr. 174.

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It is unclear from the record evidence *when* the complainant made reports of radiation safety violations to respondent, which makes a causation determination difficult because a consideration of temporal proximity cannot be made. However, the dates of the protected activity become irrelevant in this analysis, considering that the record is void of unwarranted adverse personnel actions. As previously discussed, Dr. Banner's issuance of a proposed reprimand and his decision to involve the VA police in the incident surrounding the supposed taking of government files were appropriate. The lack of

unwarranted personnel actions obviates the need for a causation determination. It appears from the record that any disparate treatment complainant felt he suffered at the hands of Dr. Banner was due to a difference in opinion as to what additional work responsibilities the complainant should or should not have to take on, or alternatively, a conflict of personality. There is no indication that Dr. Banner was motivated by whistleblowing animus.

V. Conclusion

The evidence of record reveals that Joseph De Melo engaged in protected activity by carrying out the responsibilities of his job and reporting to his supervisor radiation safety violations. However, the evidence of record does not reveal that any adverse personnel actions taken by De Melo's supervisor, Dr. Banner, were predicated on animus for reporting radiation safety violations. Therefore, Joseph De Melo has failed to establish, by a preponderance of the evidence, that any nexus exists between his protected activity and an adverse employment action.

RECOMMENDED ORDER

For the reasons set forth above, it is recommended that the complaint of JOSEPH F. DE MELO against U.S. DEPARTMENT OF VETERANS AFFAIRS under § 211 of the Energy Reorganization Act be DISMISSED.

THOMAS M. BURKE
Associate Chief Judge

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge, *See* 29 C.F.R. §§ 24.8 and 24.9, as amended by 63 Fed. Reg. 6614 (1998).

[ENDNOTES]

¹References to Cx. and Rx. pertain to the exhibits of the complainant and respondent employer, respectively. The transcript of the hearing is cited as "Tr." and by page number.

²The relief sought by complainant in his grievance is as follows: 1) "Not to set any ultimatum"; 2) Refrain from visiting his room; 3) Refrain from calling during his lunch hour; 4) Do not assign numerous projects that have short deadlines; 5) "Reflect and understand the limit of work which one person can perform"; 6) "Don't treat me like a slave"; 7) Don't give "sardonic smiles"; 8) "Don't spy on my physical movements"; 8)

"Don't try to offer tomatoes when I say no"; 9) "Understand human values"; 10) "Acquire and develop the fundamental principles of wisdom or nurture it in the performance of your duties"; 11) "Don't neglect any request made by the subordinates"; 12) "Don't overtake another person's duties" to ingratiate yourself; 13) Adhere to the suggestion of the NRC inspector and give up your Radiation Safety Officer (RSO) position; 14) "Don't force me to follow your instructions when the NRC inspectors show up" because "I know the procedures" from when "I was working for the U.S. Army"; 15) "If you cannot do health physics work then transfer the RSO position to the person who can do the job. Do not annoy others because of your inability to perform the RSO position"; and 16) "Don't try to put words in my mouth." Cx. 10, Rx. 28.

³The citations issued by the police in connection with this violation were administratively dismissed by the United States Attorney's office because the agency representative assigned to the case failed to appear on the scheduled court date for the matter. Tr. 341.

⁴Complainant was also under the impression he would receive relocation expenses from respondent. But complainant concedes that this discrepancy occurred at the onset of his employment and thus it is irrelevant to the matter at hand because it could not be connected to any whistleblowing activity. Tr. 99.

⁵In the Complaint, complainant states, "I was never made RSO and Dr. Banner never gave me any explanation as to why this was not done." Rx. 7.

⁶In complainant's July 5, 2001 letter to the Secretary of Veteran Affairs, he claims that Dr. Banner gave him low ratings prior to 1997 which resulted in complainant receiving minimal monetary performance awards. Cx. 14.

⁷Dr. Banner testified that after 1997, he did not give monetary awards to *any* of his employees because of the criteria change in the respondent's employee evaluation system. Tr. 185.

⁸Number fifteen states, "Before I left (November 27, 2001) there was no annual review of the Radiation Safety Program at the New York Campus. It was supposed to be conducted by a member or non member of the Radiation Safety Committee each year according to the NRC licence condition." Rx. 9.

⁹This list introduces evidence that the complaint brought to the attention of Dr. Banner alleged violations concerning people eating and drinking in the radioactive material labs, tips and syringes existing impermissibly in a lead safe, radioactive materials impermissibly existing in the cold room on the 6th floor, and instances when the door of the hot lab was left open.

¹⁰The complainant's other allegations of harassment that the undersigned has already determined not to be credible or correct are not considered in this constructive discharge analysis, e.g., low performance evaluations, phone tapping, following, etc.

¹¹Based on the appearance of these files (Rx. 2; Rx. 3) and the fact that the material was contained in folders typically used for radiation safety material, the undersigned finds it to be a reasonable determination by Dr. Banner on November 16, 2001, that the files were government property.